that "the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." 119/

This level of scrutiny does not permit the government to simply espouse important interests "in the abstract." Thus, even assuming that the public's "access to a multiplicity of information sources is a government purpose of the highest order," the government still must "do more than simply 'posit the existence of the disease sought to be cured.'" 120/ The government must show that the recited harms are "real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct immaterial way." 121/

The First Amendment considerations discussed in *Turner* are particularly relevant here, since the Court was concerned about "the extent to which cable operators will . . . be forced to make changes in their current or anticipated programming selections [and] the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters." 122/ The exact same concerns apply to any leased access formula proposed by the Commission that will result in the sacrifice of existing cable programming services in the name of "diversity."

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119/ *Id.* at 2469 (citations omitted).

120/ *Id.* at 2470, quoting *Quincy Cable TV, Inc. v. FCC,* 768 F2d 1434, 1455 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169, 106 S.Ct. 2889 (1986).

121/ *Turner,* 114 S. Ct. at 2470.

122/ *Id.* at 2472.

As in *Turner*, the government's conclusions that its interest will be served are not sufficient to satisfy First Amendment requirements. 123/

### B. There is No Demonstrated Governmental Interest in Creating Leased Access Quotas

The *NPRM* iterates the relevant purpose of leased access set forth in the 1984 Cable Act, which is to assure diversity of information sources, and the broadened purpose of the 1992 Cable Act amendments, which includes "the promotion of competition in the delivery of diverse sources of video programming." 124/ Yet even where such an interest is valid in the abstract, there has been no demonstration that a change in the leased access rules is needed to achieve more diversity. This is particularly true given the market changes since 1984, and the host of other policies designed to increase diversity or provide access.

In this proceeding, the basis for the FCC's perception that leased access channels are underutilized is unclear and without support. Judging from the number of complaints that have been filed since passage of the 1992 Act, it appears that Congress and the FCC have already cured any problems. Since 1992, only 42 leased access complaints have been filed according to the FCC's own records. This

123/ There, the Court found the government's showing to be inadequate despite "unusually detailed statutory findings." *Id.* at 2461. No such findings are available here to bolster the Commission's proposal.

124/ *NPRM* at ¶ 3, citing 47 U.S.C. § 532(a).

represents just one complaint for every 267 cable systems. 125/ When it established leased access channel set-asides, Congress did not conclude that full utilization would be optimal, but only that this capacity was a maximum requirement. The complaints of a few disgruntled leased access programmers -- who no doubt would prefer a lower rate -- do not demonstrate that a more intrusive approach is needed.

Additionally, the Commission cannot simply assume that more "diversity," however it is defined, is better. Although commonsensical or obvious contentions do not require empirical proof, 126/ judicial deference to administrative agencies is greatly diminished where free speech concerns are even incidentally involved. 127/ While deference to an agency's judgment may be warranted where complete factual support for that agency's predictions is not feasible, 128/ that is not the case here. Consequently, when measured against its past cable rulemakings, the contention that the *NPRM* is necessary to achieve greater diversity is strikingly unsubstantiated.

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125/ This conclusion is based on data from Warren Publishing indicating that there were 11,220 cable systems operating in the United States as of January 1, 1996. Television and Cable Factbook, Cable Vol., p. f-2 (1996).

126/ *Century Communications Corp. v. FCC,* 835 F.2d 292, 302 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1032, 108 S. Ct. 2014 (1988).

127/ *Century Communications Corp. v. FCC,* 835 F.2d at 299; *see Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. 2034, 2038 (1986) (noting that it "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity").

128/ *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814, 98 S.Ct. 2096, 2121 (1978).



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Furthermore, the demand for a convincing record for regulations is even more exacting than that for statutes. Where, "both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible of some empirical demonstration," the agency must provide evidence to support its actions. 129/

Even if there were a pressing need for more diverse programming, however, there has been no effort to demonstrate that the leased access formula fills that need. Congress did not direct the Commission to enforce a quota in each and every system, but merely established a set-aside to serve as an outer limit where warranted. The structure of the statute makes it a ceiling, not a floor. There is no evidence to support using the sub-market price to ensure that a quota will be filled. *Quincy Cable TV's* criticism of the Commission's "more is better" attitude toward must-carry, and examination of a hypothetical where a community already carries 17 local broadcast stations, are instructive:

> It is not the fact of the 18th station that is troubling, but the fact that it is guaranteed a channel even if carriage effectively bumps a cable programmer, regardless of the extent it impinges on the cable operator's editorial autonomy, and irrespective of whether it thwarts viewer preferences. Given the substantial First Amendment costs implicit in this sweeping guarantee, the Commission must make some effort to move beyond the amorphous in defining the interest served. 130/

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129/ *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1455.

130/ *Id.* at 1461.

In *Quincy Cable TV*, the Court found that the FCC fell "far short of its affirmative obligation" to demonstrate that the government's interest would be served. 131/ The same is true here.

### C. The Commission's Leased Access Formula Will Harm Existing Programmers

Under the First Amendment, the government is barred from imposing special obligations on cable operators unless the requirement furthers an important or substantial government interest and does not burden substantially more speech than is necessary to further that interest. 132/ The Commission's decision to encourage complete utilization of the set-asides on all systems, at the expense of other programmers, falls short of the narrow tailoring requirement.

Courts have not hesitated to strike down overly broad FCC regulations that restrict speech on cable television systems. In *Home Box Office v. FCC* ("*HBO*"), 133/ the D.C. Circuit ruled a variety of regulations were "grossly overbroad,"

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131/ *Id. See also Midwest Video Corporation v. FCC,* 571 F.2d 1025, 1062 (8th Cir. 1978) ("mandatory access rules explicitly and candidly appear to curtail expression indirectly by favoring access seekers over cable system owners, contrary to the injunction of *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167) (1976)), *aff'd,* 440 U.S. 689, 99 S.Ct. 1435 (1979). As the Court declared with regard to access regulations in *FCC v. Midwest Video Corp.* ("*Midwest II*"), 440 U.S. 689, 707-08 n. 17 (1979), "[e]ven when not occasioning the displacement of alternative programming, compelling cable operators indiscriminately to accept . . . programming will interfere with their determinations regarding the total service offering to be extended to subscribers."

132/ *Turner,* 114 S. Ct. at 2469 (citing *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679) (1968).

133/ 567 F.2d 9, (D.C. Cir. 1977), *cert. denied*, 434 U.S. 82, 98 S.Ct. 111 (1977).

including rules restricting the exhibition on cable television of all films over three years old. Specifically, the Court stated that the rules indiscriminately restricted the showing of older movies even though many films will never be suitable for broadcast due to limited appeal or sophisticated subject matter. 134/ *Quincy Cable TV* noted that the must-carry rules indiscriminately protected all broadcasters, including the unthreatened ones, and without regard to the amount of local service available and carried. 135/ *Century Communications Corp. v. FCC* 136/ rejected the conjecture that consumers would need five years to get accustomed to switching between their cable system and over-the-air broadcasts. 137/

As explained above, the proposed leased access rules are fatally overinclusive because they would not just allow, but would subsidize leased access programmers without regard to their need for financial assistance or their contribution to diversity. Noting a similar flaw in the must-carry context, *Quincy* concluded: "This blanket protection, by sweeping even the most financially secure broadcaster under the rules' beneficent mantle, reaches well beyond the rules' asserted objective of assuring

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134/ *Id.* at 51.

135/ *Quincy Cable TV*, 768 F.2d at 1459-62.

136/ *Century Communications Corp. v. FCC*, 835 F.2d 292, 302 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032, 108 S. Ct. 2014 (1988).

137/ *Id.* at 300-04.

that the advent of cable technology not undermine the financial viability of community-oriented, free television." 138/

Also, as explained above, the most significant flaw in the Commission's proposal is that it actively encourages -- if not requires -- the sacrifice of networks that currently provide diverse programming choices to subscribers. The requirement that cable operators create "hit lists" could cripple programming services whether or not demand for leased capacity ever materializes. The act of designation will itself put programmers -- and their potential advertisers, investors and program suppliers, -- on notice that their days are numbered. Loss of such services is a loss of diversity.

Even if the Commission could demonstrate that the leased access replacements were comparable to the displaced services, the statutory and constitutional imperatives would be unmet. Such a result would not *increase* diversity. In any event, as the Supreme Court held in *Buckley v. Valeo*, 139/ the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." 140/

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138/ *Quincy Cable TV,* 768 F.2d at 1461.

139/ 424 U.S. 1, 96 S.Ct. 612 (1976).

140/ *Id.* at 48-49, 96 S.Ct. at 649; *see also Greensburg v. Bolger*, 497 F.Supp. 756, 778 (E.D.N.Y. 1980) ("in a competitive intellectual environment, assistance to one competitor is necessarily a relative burden to the other").

### D. Less Intrusive Means of Promoting Diversity Have Emerged Since 1984

The multichannel video distribution marketplace has changed dramatically since leased access requirements were introduced. Other laws address any perceived need to provide competitive access to cable systems. Also, technological evolution and the Telecommunications Act of 1996 have fostered delivery systems for video programming such that competitors will include not only competitive cable services, but also MMDS, DBS, and OVS. Consequently, the notion that cable operators are the sole gatekeepers through which all video distribution must pass -- the central assumption of leased access -- is no longer true.

#### 1. Program Access Requirements

Several sections of the 1992 Act regulate programming practices of vertically integrated entities. 141/ For example, Congress restricted the ability of vertically integrated cable operators to enter into exclusive contracts with programmers. 142/ Congress also established limits on the ability of vertically integrated satellite programming vendors to discriminate in favor of affiliated cable operators in the prices, terms and conditions of their programming contracts. 143/ These "program access" requirements -- and the FCC's rules implementing the requirements (47 C.F.R. §§ 76.1000 - 1003) -- provide a more suitable vehicle to allay

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141/ Communications Act, §§ 616, 628, 47 U.S.C. §§ 536, 548.

142/ *Id.*, § 628(c)(2)(C), (D), 47 U.S.C. § 548(c)(2)(C), (D).

143/ *Id.*, § 616(a), 47 U.S.C. § 536(a).

those concerns raised by vertical integration. By both targeting generally unfair competitive practices and prohibiting specific unfair practices, the Commission has deployed a more narrowly tailored mechanism to curtail undue or improper influences.

The 1992 Cable Act also established limits on the amount of channel capacity that a cable operator could devote to affiliated programming services. Pursuant to this section, the FCC established rules that no cable operator may devote more than 40% of its activated channels to the carriage of programming services owned in part by that operator. 144/ This rule was adopted pursuant to Section 613 of the Act.

These provisions are less intrusive than the leased access approach now proposed in various ways. First, the program access and vertical affiliation provisions purport to serve the same governmental interest as the leased commercial access provisions but do not require the sacrifice of channel capacity. Second, the Commission noted the importance of understanding the market for cable programming services in implementing these sections. For example, the FCC noted that while it sought to "prohibit unfair and anticompetitive actions" in implementing Section 628, its goal was to do so "without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace." 145/ Similarly, in implementing Section 616 of the 1992 Cable Act, the

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144/ 47 C.F.R. § 76.504.

145/ *Program Access, First Report and Order*, MM Docket No. 92-265, 8 FCC Rcd 3359 at ¶ 100 (1993).

FCC acknowledged the importance of market forces, emphasizing that its rules would be tailored to prohibit specific practices with respect to carriage agreements "without unduly interfering with legitimate negotiating practices between multichannel video programming distributors and programming vendors." 146/ Due to the preciseness of these rules, the program access requirements are better designed than the leased access proposal to curb any improper use of market power without interfering with the programming marketplace.

### 2. PEG Channels

To the extent the Commission is interested in promoting noncommercial forms of access, other provisions of the 1984 Act are better suited to that purpose. Section 611 of the 1984 Cable Act empowered local franchising authorities to establish rules and procedures designating channel capacity for public, educational, or governmental use. This provision reflected the fact that almost all of the franchise agreements at the time the 1984 Act was adopted provided for access by local governments, schools, and non-profit and community groups on "PEG" channels. 147/ Requirements of reasonable access for PEG channels were designed to bring about a diversity of information sources, and provide entities who have generally been without

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146/ *Development of Competition and Diversity in Video Programming Distribution and Carriage, Second Report and Order*, 73 RR2d 1350 at ¶ 1 (1993).

147/ 1984 House Report at 30.

access to enter the electronic marketplace of ideas. 148/ To whatever extent there is a governmental interest in promoting such access, Section 611 adequately fills that need.

### 3. Competition in the Delivery of Multichannel Video Service

Leased access rules were created during a time when there was no competitive alternative by which video services could be provided. Nor was there a common carrier service that programmers could use. Now, however, both options exist through the opening up of DBS and OVS services. Telephone companies operating open video systems ("OVS") are required by statute to make up to two-thirds of their channel capacity available to unaffiliated programmers. 149/ Commercial access programmers, therefore, will have the option to seek carriage on OVS systems on a common carrier basis.

The common-carrier-like model adopted by Congress for OVS provides a more appropriate vehicle for leased-access type arrangements. First, the statutorily created structure of OVS is well-suited to accommodate leased access programmers because it is similar to a common carriage model. OVS systems initially will be designed and programmed taking into account the requirement that two-thirds of activated channel capacity must be made available to others. Second, OVS systems will have greater channel capacity than traditional cable systems. Third, because OVS systems have not yet begun operating, existing programmers will not have to be

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148/ *Id.*

149/ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 § 302 (1996), 47 U.S.C. § 653(b)(1)(B).

displaced to make room for leased access programmers. Accommodating commercial access programmers on an OVS system, therefore, would be consistent with the regulatory framework and technical characteristics of that service.

DBS also has begun to emerge as a legitimate competitor to cable, eliminating whatever competitive limitations that previously existed with respect to cable operators. According to the Commission's 1995 Report on the status of competition in the market for the delivery of video programming, 150/ alternative technologies have made progress toward the development of a competitive marketplace for video programming distribution. 151/ Subscribership to DBS services has increased rapidly, growing over 600,000 in the first nine months of 1995 to reach 2.4 million households. 152/ During this short time period, DBS availability rose from 23 to 49 states, and estimates for subscribership by the end of the decade range from 4.66 million to over 21 million. 153/

The articulated rationale for leased access -- the potential market power of vertically integrated cable operators -- has been further undermined by Congress' elimination of the ability to grant exclusive franchises. 154/ With the elimination of

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150/ *1995 Competition Report.*

151/ *Id.* at ¶ 5.

152/ "Is Cable Ready to Compete With New Rivals," *Cable World*, April 29, 1996, p. 182.

153/ *1995 Competition Report* at ¶¶ 49-50.

154/ 47 U.S.C. § 541(a)(1).

restrictions on local telephone company entry into cable (or, alternatively, OVS), 155/ Congress has paved the way for new competition to cable. Between DBS, MMDS, OVS, and telephone companies offering franchised cable service, the need for any type of access requirement is greatly diminished.

## VI. CRITERIA FOR EVALUATING LEASED ACCESS RATES

The FCC has full authority to adopt a more measured approach that would permit operators to add leased access channels without bumping existing services. As with social contracts in the context of rate regulation, a more flexible approach to leased access requirements would serve the statutory goals and the FCC's broader mandate, without the harsh (and unintended) consequences that would attend the more strict regulatory model.

When Congress adopted the leased access provision in 1984, it recognized that the cable industry was evolving and that it should not interfere with the development of the industry or the programming services. Therefore, in addition to the concern for the "operation, financial condition [and] market development of cable systems," Congress also included express language in the statute recognizing that when cable coverage and penetration reached a certain point, the FCC should reexamine its rules in this area. 156/ The legislative history indicates that the purpose

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155/ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 § 302 (1996).

156/ Specifically, Congress provided that "at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems

[Footnote continued]

of this provision was "to assure that there is adequate flexibility to develop new rules and procedures with respect to the use of leased access channels as the cable industry develops and serves more citizens in the future." 157/ Congress wisely did not dictate how the FCC should respond to future developments in the market, because it could not predict what they might be. But it emphasized that "the Commission should not see its role as that of a traditional common carrier regulator," and that "the Commission *may not* increase the number of channels required to be set aside under this section." 158/

The Programmers recognize that it is difficult to devise a fair and efficient maximum reasonable rate for leased access channels because there is no natural market for leased access. As described above, the government has attempted to create a market where none existed. Accordingly, Programmers are not prepared at this point to endorse a particular formula. Nevertheless, it is possible to identify policies that the Commission should adopt (or avoid) in order to satisfy statutory and

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[Footnote continued]

are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources." Communications Act § 612(g), 47 U.S.C. § 532(g).

157/ 1984 House Report at 54. The cable industry has almost reached the 70/70 benchmark (according to the 1995 Competition Report). Thus, there has been sufficient growth in the industry -- including a virtual explosion in the number and variety of programming services available to subscribers -- to warrant the close examination of leased access requirements contemplated by Congress. *1995 Competition Report*, at ¶¶ 13-14, (cable passes 96% of TV households nationwide, and serves 65.2% of homes passed).

158/ 1984 House Report at 54 (emphasis added).

constitutional obligations. Listed below are several criteria that should guide the Commission's thinking in setting a maximum reasonable rate for leased access:

### A. Do Not Seek to Enforce a Quota

Throughout the *NPRM*, the Commission explicitly acknowledges that the determination of a maximum reasonable rate should promote competition and enhance diversity, rather than simply reduce leased access rates. 159/ However, in translating these concepts into a formula, the *NPRM* tips the scale in favor of leased access programmers by seeking to "encourage the use of the set-aside channels" to fill a quota. 160/ This manipulation of demand would distort the entire programming market. The leased access set-asides in the Cable Act establish a ceiling -- not a floor -- and the Commission should not adopt a policy designed to subsidize service in order to satisfy a governmentally-defined level of "demand."

### B. Avoid a "Hit List" and Recognize the Value of Tier Placement

No solution should be based on a "hit list." The Commission's proposed requirement that cable operators designate which programmers will be bumped is devastating for several reasons. In addition to the obvious loss of carriage, such a list would create undue alarm with viewers, third party programmers, investors and advertisers, causing a decrease in revenue and support even though the programmer

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159/ *See NPRM* at ¶¶ 27, 28.

160/ *Id.* at ¶ 65.

may never be dropped. Moreover, the designated channels and the proposed formula do not provide a rational basis for assigning a market value to the leased capacity to be made available.

### C. Any Transition to a New Formula Should Not Allow Bumping Existing Services or Preempting New Services

The Programmers share the Commission's concern that an abrupt change to a cost-based methodology may result in a sharp increase in leased access demand, which, in turn would cause the displacement of existing services. 161/ The Programmers further agree that any change in the methodology for calculating leased access rates should be phased in over time. 162/ However, rather than choosing an arbitrary date for a phase-in, as the Commission has proposed, the transition should be based on the availability of channel capacity on the cable system. This is precisely how Congress envisioned the implementation of leased access requirements. 163/

Under this approach, cable systems would be required to add leased access channels only if they have the channel capacity to do so without bumping an existing service. 164/ This method would satisfy the Commission's objectives for

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161/ *Id.* at ¶ 99.

162/ *Id.* at ¶ 99.

163/ *See* 47 U.S.C. § 532(b)(1)(E).

164/ If a programming service has a contract to be carried on a given channel, that channel should be considered occupied by an existing programmer even if the service is not yet actually carried on the system.

and that regulators should keep a broad perspective in setting maximum reasonable rates for access. Congress created leased access set-asides in the 1984 Cable Act as a safety valve in response to cable operators' perceived incentives to discriminate against certain programmers. Much has happened since then, including the development of DBS and OVS. A long-term perspective is essential at this time. Policymaking for leased access must consider the changing technological and marketplace environment and not stifle creative efforts to prepare for the expanded channel capacity of tomorrow. Because digital compression and other developments will increase capacity down the road, it is imperative that established and fledgling new networks not be more challenged for channel space than they already are under existing competitive pressures.

## CONCLUSION

The Programmers urge the Commission to reject the proposed cost-based approach to leased access rate-setting. Instead of focusing on filling a leased access quota by lowering access rates, the Commission should develop rules that serve the greater goal of diversity. The criteria by which the Commission should be guided in establishing leased access rates should include recognition of the important role of existing and proposed programming services in providing diversity. Leased access rules, therefore, should be designed to avoid displacing these voices.

Respectfully submitted,

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proposing transition relief. Specifically, it would "(a) avoid unduly penalizing operators and programmers for decisions to use designated channels for non-leased access programming that were reasonably based as circumstances created by the Commission's previous rules, and (b) mitigate against the sudden disruption to subscribers' programming line-ups." 165/

Any leased access rules must specifically take into account new launches. The FCC should only require cable operators to set aside new capacity for leased access in proportion to the statutory requirement. Otherwise, the rule would undermine the incentive for cable operators to add channel capacity and would kill the launch of new networks. 167/

**D. Full Time Programming Services Should Not Be Displaced By Part Time Leased Access**

The Programmers are concerned that any rate methodology encouraging part-time use of leased access channels will cause great disruption and subscriber confusion. At a minimum, as the Commission suggests, 168/ full-time leased access

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165/ *NPRM* at ¶ 99.

167/ To address the immediate shortage of channel capacity that affects both new launches and existing services, the Commission should consider implementing a blanket waiver of leased access requirements for systems with fewer than 60 activated channels.

168/ *Id.* at ¶ 129.

programmers should be preferred over part-time access programmers. Clearly, the interests of diversity would not be served by rules that would require cable operators to dedicate an entire channel to leased access programming when the leased access programmer proposes to provide only a few hours of programming.

Additionally, the Programmers oppose any proposal that would require displacement of an existing programming service for a part-time leased access programmer. Consistent with their position that existing services should not be bumped for *any* leased access programmer, the Programmers suggest that part-time access channels should be accommodated only to the extent that excess channel capacity is available on a system.

**E. Avoid Solutions That Create Uncertainty**

Section 613 requires the Commission to adopt rules that are consistent with the operation, financial condition and market development of cable systems. Accordingly, the rules should reflect market realities, and, in particular, should avoid creating uncertainty. For that reason alone, the Commission's hybrid cost-based/market-based formula should be rejected. Such a formula would cause great disruption to programming lineups by shifting the rules, depending upon the occupancy levels of leased access channels. Instead, the Commission should choose a single formula and stick with it.

**F. Implement Leased Access Requirements As Part of a Broader Regulatory Framework**

Since 1984, changes in both technology and the law have demonstrated that the cable programming marketplace produces diversity through competitiveness,